

A bankruptcy proceeding filed by respondent in Tennessee stayed the current claim beginning September 28, 2012, and was lifted on January 24, 2013, following a motion filed by claimant. The ALJ overruled respondent's objection to the admission of Dr. Zimmerman's deposition and medical report because Dr. Zimmerman's examination of claimant occurred on November 16, 2012, at which time the stay was in effect. Claimant provided Dr. Zimmerman's report to respondent on January 30, 2013, six days after the bankruptcy stay was lifted. Therefore, the ALJ found a clear intent by claimant to comply

with both the bankruptcy court Order and K.S.A. 44-515, and allowed Dr. Zimmerman's testimony.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues the medical report and related opinions and conclusions of Dr. Zimmerman should be excluded based upon claimant's failure to produce the same to respondent within the time frame allotted by K.S.A. 44-515(a). Respondent maintains only the medical opinion of Dr. Bieri is properly in the record, which states claimant has sustained a 21 percent whole person impairment. Further, because Dr. Bieri did not opine as to claimant's task loss, respondent states "claimant's award must be limited to something between 21 [percent] functional impairment to the body and a 50 [percent] work disability."¹

Claimant contends the ALJ's Award should be affirmed in all respects. Moreover, claimant maintains respondent's arguments regarding the admissibility of Dr. Zimmerman's medical opinions and report are erroneous due to the stay imposed by the bankruptcy court.

In its Application for Review to the Board, respondent listed as issues whether claimant sustained an accidental injury arising out of and in the course of his employment with respondent on September 8, 2009, and whether claimant is entitled to TTD benefits for the period of November 1, 2009, through January 4, 2012. At oral argument before the Board, respondent advised both issues were no longer in dispute. As such, neither will be addressed in this Order.

The sole issue for the Board's review is:

1. What is the nature and extent of claimant's disability?
 - a. Should Dr. Zimmerman's opinions be excluded pursuant to K.S.A. 44-515?

FINDINGS OF FACT

Claimant began employment with respondent in December 2008 as a trailer mechanic and manager of respondent's shop in Spring Hill, Kansas. This position required claimant to crawl under trailers and climb up ladders, remaining on his feet throughout the work day.

¹ Respondent's Brief (filed Dec. 23, 2013) at 3.

Claimant testified he injured his right knee on September 8, 2009:

I pulled a curtain trailer into the shop to work on it and there was water dripping down the curtain. I crawled under the trailer, did my work. When I crawled out from under the trailer, I slipped in the water that was dripping off the side of the trailer, and my foot went to the right and my knee went down to the left and I fell, twisting my [right] knee.²

Claimant testified he suffered pain in his right knee. Claimant reported the incident to his supervisor at East Bridge Trailers in Tennessee, Judy Whitt, who advised him to present at Olathe Occupational Medicine. Claimant was initially treated at Olathe Occupational Medicine before he was referred to Dr. Gregory P. Lynch.

Claimant had three surgeries to his right knee prior to the September 2009 incident. Claimant's first surgery, a partial medial meniscectomy, was performed by Dr. Edelson in Oregon on December 29, 2006. This was followed by a second procedure, a right postero-lateral corner reconstruction also performed by Dr. Edelson, on July 2, 2007. Claimant continued to have right knee pain and underwent a right knee reconstruction of the fibular collateral ligament in November 2008 with Dr. Lynch.

Claimant continued to follow up with Dr. Lynch throughout 2009. Claimant testified his right knee continued to swell on occasion and produce pain, and on July 10, 2009, Dr. Lynch provided a Synvisc-One³ injection to the right knee. Claimant again visited Dr. Lynch on July 24, 2009, with recurrent right knee pain and swelling.

Dr. Lynch examined claimant following his accident and referral from Olathe Occupational Medicine on September 23, 2009. Claimant followed up with Dr. Lynch until January 13, 2010, at which time respondent declined to authorize further treatment.

Claimant testified he began experiencing low back pain due to limping. Claimant stated he began using crutches of his own accord since approximately three months prior to his first appointment with Dr. Lowry Jones, a physician authorized by the court. Dr. Jones first examined claimant on January 13, 2011. Claimant testified Dr. Jones examined both his right knee and his back, but chose to defer treatment of his back until first treating his right knee.

Claimant underwent a partial medial and lateral meniscectomy with Dr. Jones on February 25, 2011. This surgery was unsuccessful in restoring claimant's ability to walk, and as a result, Dr. Jones referred claimant to Dr. Robert Gardiner, an orthopedic surgeon in Dr. Jones' group.

² P.H. Trans. (July 13, 2010) at 5-6.

³ Synvisc-One is a viscosupplementation that lubricates the knee joint.

Dr. Gardiner performed a total right knee joint replacement on September 8, 2011. Claimant testified he had no problems with his right knee following the replacement surgery and was eventually released from Dr. Gardiner's care on January 4, 2012. Dr. Gardiner imposed permanent restrictions: no bending, stooping, kneeling, walking for a great length of time, excessive running, jogging, or lifting. Dr. Gardiner advised claimant to remain with sedentary work and to change positions as necessary for pain control.

In an Order dated April 19, 2012, Dr. Vito Carabetta was authorized by the ALJ to determine if claimant was in need of additional medical treatment, specifically of the low back. Dr. Carabetta performed a court-ordered independent medical evaluation of claimant on May 30, 2012. Claimant presented with complaints of constant sharp pain across the lumbosacral region. Dr. Carabetta took a history of claimant, reviewed available medical records, and performed a physical examination. Dr. Carabetta's impression was low back pain, bilateral sciatica, and status-post right knee total arthroplasty. After subsequently obtaining a CT myelogram of claimant's lumbar spine and performing an EMG nerve conduction study, Dr. Carabetta determined claimant's low back condition is "primarily a mechanical low back pain due to an alteration in his gait pattern from his prior knee surgery."⁴

Claimant was also seen by Dr. Daniel Schaper of Johnson County Orthopedic for evaluation and treatment of his low back. Claimant testified Dr. Schaper prescribed medication.

Dr. Daniel D. Zimmerman, a board certified independent medical examiner, evaluated claimant at his counsel's request on November 16, 2012, for purposes of an independent medical evaluation. Claimant presented with pain and discomfort affecting the lumbosacral spine and right knee. Claimant also indicated to Dr. Zimmerman he had numbness and tingling in the left lower extremity on a nearly daily basis. After reviewing claimant's history, medical records, and performing a physical examination, Dr. Zimmerman determined:

[Claimant] had right knee aggravation of degenerative arthritis with a further tear of the medial meniscus due to the accident on September 8, 2009. And as a consequential condition, he had lumbar spine pathology due to what I said was a consequential development of what had been characterized as mechanical low back pain with lumbar disc disease at L4-L5.⁵

Dr. Zimmerman opined, "Although [claimant] has achieved maximum medical improvement, it is more probably true than not that additional medical treatment provided

⁴ Carabetta Report (August 31, 2012) at 2.

⁵ Zimmerman Depo. at 20-21.

or prescribed by a licensed physician will be necessary in the future.”⁶

Dr. Zimmerman imposed the following permanent restrictions: avoid flexing of the lumbosacral spine and right knee, and avoid bending, stooping, squatting, crawling, kneeling, and twisting activities. Further, Dr. Zimmerman stated claimant was able to be seated for approximately 15 minutes before changing positions, stand for approximately 10 minutes, and walk a distance of less than one-half block.

Using the *AMA Guides*,⁷ Dr. Zimmerman rated claimant’s right knee with a 75 percent permanent partial impairment of the right lower extremity, 9 percent of which predates claimant’s September 8, 2009, injury. Therefore, Dr. Zimmerman determined claimant has a 66 percent permanent partial impairment of the right lower extremity at the knee level, which translates to 26 percent permanent partial impairment of the body as a whole. Regarding claimant’s low back, Dr. Zimmerman indicated claimant sustained an 18 percent permanent partial impairment of the body as a whole. Dr. Zimmerman opined claimant sustained a combined 39 percent permanent partial impairment of the body as a whole as a consequence of the September 8, 2009, work-related accident.

Dr. Peter V. Bieri, a neutral court-appointed physician, examined claimant for purposes of an independent medical evaluation on April 23, 2013. Claimant indicated to Dr. Bieri he had constant moderate pain, weakness, and loss of active range of motion in his right knee, and gait abnormality which had increased his low back pain. Claimant stated his back pain was constant. Dr. Bieri reviewed claimant’s history, medical records, and performed a physical examination. Dr. Bieri opined:

The claimant incurred injury during the course of active employment reported on or about September 8, 2009. Such injury historically involved the right knee, which had a pre-existing history of at least two surgical interventions as described. The claimant eventually required total knee replacement on the right, with less than an optimal result. He also developed complaints of persistent low back pain, variously attributed to pre-existing degenerative joint disease and aggravation secondary to gait abnormality.

. . . .

Based upon the mechanism and nature of injury, and treatment type, duration and response, I conclude at the time of this evaluation the claimant has achieved maximum medical improvement and the impairment(s) to be permanent and

⁶ *Id.*, Ex. 2 at 9.

⁷ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

stabilized.⁸

Using the *AMA Guides*, Dr. Bieri rated claimant with a 50 percent right lower extremity impairment at the level of the knee. Of that 50 percent, Dr. Bieri determined 7 percent was preexisting, giving claimant a 43 percent impairment to the right lower extremity attributable to the injury of September 8, 2009. This 43 percent translates to a 17 percent impairment to the body as a whole. Dr. Bieri further rated claimant with a 5 percent impairment to the body as a whole related to the low back. Therefore, Dr. Bieri opined claimant sustained a combined 21 percent impairment to the body as a whole.

Dr. Bieri concluded claimant meets the general physical demand level defined as “light,”⁹ restricting claimant to lifting up to 20 pounds occasionally, 10 pounds frequently, and negligible constant lifting. Claimant should limit sustained weight-bearing and ambulation to no more than one hour, with thirty minutes for postural adjustment. Dr. Bieri opined regarding claimant’s capability of substantial, gainful employment:

It is explained in detail to the claimant that he would be able to work within the physical restrictions identified, but this did not take into account any other factors related to employability, such as experience, education, or current use of narcotic medication. Beyond any of these additional factors, which are outside the medical determination, I explained to the claimant that I believed he was capable of working within the restrictions issued.¹⁰

Mr. Michael Dreiling, a vocational counselor and registered rehabilitation specialist, interviewed claimant at his counsel’s request on May 16, 2013. Mr. Dreiling recorded two principal employments during claimant’s 15-year work history preceding the 2009 injury: carpet installation and mechanic work. Since earning his high school diploma over 30 years ago, claimant had no vocational training other than what he learned on-the-job as a trailer mechanic. Claimant informed Mr. Dreiling he has no typing skills, and all jobs held in his adult life were manual labor. Mr. Dreiling identified 20 tasks claimant performed in the 15-year period preceding his 2009 injury. Dr. Zimmerman reviewed the task list generated by Mr. Dreiling and opined claimant was unable to perform all tasks, for a 100 percent task loss.

Mr. Dreiling opined claimant was essentially and realistically unemployable in the open labor market, a conclusion he testified was confirmed by claimant’s status as a Social Security Disability recipient. Claimant testified he applied for and received Social Security Disability benefits commencing March 2012.

⁸ Bieri Report (Apr. 23, 2013) at 5.

⁹ *Id.* at 6.

¹⁰ *Id.* at 7.

Mr. Steve Benjamin, a vocational rehabilitation consultant, also interviewed claimant at respondent's request on August 8, 2013. Mr. Benjamin interviewed claimant by telephone and did not see him in person. Mr. Benjamin prepared a task list of 42 unduplicated tasks performed by claimant in the 15-year period preceding his 2009 injury. Mr. Benjamin testified by deposition that in reviewing the medical restrictions placed upon claimant by Dr. Zimmerman, claimant would suffer an 84.3 percent task loss, and claimant would suffer a 71.4 percent task loss under the restrictions imposed by Dr. Bieri.

Mr. Benjamin testified claimant would be unable to perform unskilled, skilled, or semi-skilled labor jobs based upon the medical records reviewed. Further, Mr. Benjamin agreed claimant would not have a full range of light duty work capacity nor could he have full capacity for sedentary work due to his restrictions.

Claimant stated he has not worked since November 1, 2009, the last day worked for respondent. Claimant explained respondent was unable to accommodate the sedentary restrictions placed by Dr. Lynch. Claimant continues to receive Social Security Disability benefits as his sole source of income.

PRINCIPLES OF LAW

The Workers Compensation Act places the burden of proof upon the claimant to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the conditions on which that right depends.¹¹ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.”¹²

Permanent total disability exists when an employee, on account of his or her work-related injury, has been rendered completely and permanently incapable of engaging in any type of substantial, gainful employment.¹³ An injured worker is permanently and totally disabled when rendered “essentially and realistically unemployable.”¹⁴

¹¹ K.S.A. 2009 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

¹² K.S.A. 2009 Supp. 44-508(g).

¹³ K.S.A. 44-510c(a)(2) (Furse 2000).

¹⁴ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

ANALYSIS

1. What is the nature and extent of claimant's disability?

The ALJ found claimant to be permanently and totally disabled as the result of his work injury. The ALJ found claimant to be realistically unemployable and unable to find employment based upon Dr. Zimmerman's opinions. Respondent filed a motion to exclude Dr. Zimmerman's report and testimony pursuant to K.S.A. 44-515. Respondent argues a different result would occur if Dr. Zimmerman's opinions are not considered.

Respondent argues claimant is not permanently and totally disabled based upon the report of Dr. Bieri. Respondent relies on Dr. Bieri's light duty restriction as a basis of claimant's ability to find employment. Respondent alleges Dr. Bieri explained to claimant he would be able to work within the assigned restrictions. The issue of employability is not entirely a medical issue, but requires proof claimant can actually find a job within the parameters of the medical opinions.

In support of claimant's position, Mr. Dreiling testified claimant was essentially and realistically unemployable in the open labor market. Mr. Dreiling stated the restrictions placed on claimant by Dr. Bieri restricted claimant to a less than full range of light work. Mr. Dreiling stated claimant possessed no particular qualifications for jobs that were within the less than full range of light duty. Mr. Dreiling testified claimant had no transferable skills with his medical restrictions. He also stated the daily use of narcotic medications by claimant also impeded claimant's ability to find employment. Mr. Dreiling testified he has worked in the Kansas City area for 25 years and was familiar with the job market.

Based upon the report submitted by Dr. Bieri and the testimony provided by Mr. Dreiling, claimant met his burden of proving he is essentially and realistically unemployable in the open labor market. The burden now shifts to respondent to show claimant is not essentially and realistically unemployable in the open labor market.¹⁵

Respondent presented the testimony of Mr. Benjamin in support of this premise. Mr. Benjamin agreed that with the standing limitation of no more than one hour placed on claimant by Dr. Bieri, claimant would not be able to perform a full range of light duty work. Mr. Benjamin did not identify any transferable skills as a part of his evaluation.

Mr. Benjamin also stated he did not perform a labor market study, which would have identified jobs available to claimant within his less than light duty restrictions. Mr. Benjamin stated he does not personally provide placement services in the Kansas City area. Without a familiarity with the local labor market or the identification of transferable skills, it is

¹⁵ *Easter v. Stormont-Vail Health Care, Inc.*, No. 109,477, 311 P.3d 1168 (Table) (Kansas Court of Appeals unpublished opinion filed Nov. 1, 2013).

improbable Mr. Benjamin could meet the burden required to refute the premise that claimant is essentially and realistically unemployable in the open labor market.

The issue of whether Dr. Zimmerman's report and testimony should be excluded is rendered moot by the Board's finding claimant is essentially and realistically unemployable based solely on Dr. Bieri's restrictions and Mr. Dreiling's testimony.

CONCLUSION

Claimant is essentially and realistically unemployable in the open labor market and entitled to compensation for permanent total disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated November 19, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2014.

BOARD MEMBER

BOARD MEMBER

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